No. 3704 and 3699

United States Circuit Court of Appeals

For The Ninth Circuit

McDONALD-WEIST LOGGING COMPANY, a Corporation,
Appellant,
vs.
E. L. COBB, as TRUSTEE IN BANKRUPTCY of the CRAIG LUMBER COMPANY, a Corporation, BANKRUPT,
Appellee.

E. L. COBB, as TRUSTEE IN BANKRUPTCY of the CRAIG LUMBER COMPANY, a Corporation, BANKRUPT,
Appellant,
vs.
McDONALD-WEIST LOGGING COMPANY, a Corporation,
Appellee.

BRIEF OF McDONALD-WEIST LOGGING COMPANY

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1

Roden & Dawes, Juneau, Alaska,

Arthur I. Moulton, 401 Board of Trade Bldg., Portland, Oregon.
Attorneys for McDonald-Weist Logging Company.

J. H. Cobb, Juneau, Alaska,
Attorney for E. L. Cobb, Trustee.

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INDEX

Page

Statement of the Case 5

Points and Authorities 10

Argument: The Logging Company ought not to Lose the Benefit of the Work Done by It Because of Inaccuracy in Preparation of the Papers Filed by It in Seeking to Comply with the Alaska Corporation Laws 12

A Corporation is a Person, Within the Meaning of the Lien Laws 14

The Alaska Statutes Extended the Right of the Logger's Lien as Well to Those Who Furnished Labor as to Those Who Physically Performed It 14

INDEX

Page

INDEX TO AUTHORITIES.

In re Craig Lumber Co., 266 Fed. 692 10
Sec. 660 Compiled Laws Alaska, 1913 11
V. Thompson on Corporations, Sect. 6708 11
Sec. 709 Compiled Laws Alaska, 1913 11
Day vs. Green, 62 Or. 293, 127 Pac. 772 11
W. T. Ry. Co. vs. Tennas Bros. Co., 145 Fed. 458 11
Chapman vs. Brewer, 62 N. W. 320 (Neb.) 11
Jones on Liens, Sec. 720 11
Hogan vs. O'Neill, 5 N. W. 490 11
Carver vs. Bagby, 81 N. W. 757 (Minn.) 11
Breault vs. Archambault, 67 N. W. 348 (Minn.) 12
Hopkins vs. Jamieson-Dickson Mill Co., 39 Pac. 815 12
Blumauer vs. Clock, 64 Pac. 844 12
O'Connor vs. Burnham, 95 Pac. 1013 12
Martin vs. Wakefield, 42 Minn. 176 12
Fischer vs. Cone Lbr. Co., 49 Or. 277; 89 Pac. 737 12
Schultz vs. Shively, 72 Or. 450, 143 Pac. 1115 12
End. Interp, Statutes, Secs. 87 and 89 15
Perry vs. Duluth, Etc., Ry. Co., 56 Minn. 306 19
Gen. Statutes Minn., Sec. 6231 19

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STATEMENT OF THE CASE

The two cases numbered 3699 and 3704 in this court arise upon an appeal by E. L. Cobb as Trustee in Bankruptcy of the Craig Lumber Company, a corporation, bankrupt, from an order allowing a claim of McDonald-Weist Logging Company, a corporation, against said bankrupt as an unsecured claim, which appeal

is known as No. 3699, and an appeal of the McDonald-Weist Logging Company from that part of the same order which denied its assertion of a preferred claim securing the amount found to be due it. Consequently the two appeals in reality constitute but one proceeding and may be treated together in this Court. The proceedings arose in the bankruptcy side of the District Court for the District of Alaska, Division No. 1, at Juneau.

The McDonald-Weist Logging Company and Craig Lumber Company are both Washington corporations. For convenience hereinafter the Craig Lumber Company will be called the lumber company and the McDonald-Weist Logging Company will be called the logging company. The lumber company was engaged in operating a sawmill at Craig, Alaska, and it had arranged with the United States forestry officials for the purchase on stumpage basis of timber from a tract of federal forest reserve on Long Island in the Division of Alaska.

The logging company was a corporation formed and solely owned by four brothers, G. B. McDonald, L. J. McDonald, Allen McDonald and C. P. McDonald. These men were all practical loggers and the corporation was no more than a convenient means of keeping track of their logging business which was confined to work in which they actively and physically participated and which was under their immediate control. On the 2nd of January, 1918, these brothers, in the name of the logging company,

took a job with the lumber company cutting logs from the said forest reserve and delivering them in rafts in the water at Howkan, Alaska, at the rate of $10 per thousand feet. The understanding in which this job was taken was not in writing and the outstanding feature of it was that the lumber company was to pay the logging company for its work in cutting logs at the rate of $10 per thousand feet. It was also to pay at the same rate for any boom sticks it failed to return to Howkan.

The logging company, through its officers and without the aid of counsel, undertook to fill out the necessary blanks to qualify to do business under the laws of Alaska and filed certain papers, as more fully appears in the records here. No effort will be made in this brief to detail these papers or the circumstances of their filing, as it is the contention and theory of the logging company that the questions relative to the sufficiency of the action taken by the logging company in seeking to qualify to do business in Alaska, are all res judicata. This contention is based on the fact that heretofore, in this same bankruptcy proceeding, the referee in bankruptcy at Juneau held, on the petition of the trustee in bankruptcy, that the attempt at compliance made by the logging company was abortive and that it was not qualified to do business under the laws of Alaska and that therefore the agreement was void and the claim should be expunged. An appeal was taken from this decision of the referee to the District Court at Juneau, which

reversed the referee's holding, and the trustee petitioned this court for a review of that ruling and that petition was denied by this Court. The decision of the District Court upon that angle of the case therefore became final long prior to the decree appealed from and is not open now to question. All these facts appear from the record.

In the month of April, 1918, these four brothers, together with as many as six to eight hired men, an average of about four men in addition to themselves, began the cutting of logs under the oral hiring aforesaid, and between that time and the 20th day of December, 1918, they cut and rafted 3,779,426 feet of logs, which, at the rate agreed upon, earned them the sum of $37,794.26. A detailed statement of the time of the cutting of various rafts of logs appears in the opinion of the referee forming a part of the record on both of these appeals, and without detailing the time the logs were cut and the state of the account, it is sufficient to say that on the 20th day of December, 1918, a balance was due the logging company on account of the cutting of logs of $28,871.50, and that this accrued on account of work done within a period of less than six months prior to the 30th day of December, 1918. In the cutting of the logs in question all of the four brothers aforesaid worked not less than twelve hours per day, seven days per week, at the very hardest manual labor during the time covered by the claim.

All of these facts are set forth in the opinion of the referee aforesaid and both parties have adopted that opinion without objection or exception and the case was tried upon the facts therein appearing in the District Court and may be tried in the same way here. It is, therefore, unnecessary to state the facts more in detail than has been done, inasmuch as that opinion is concise. It appears at page 7 of the Transcript in the appeal No. 3704.

On the 30th day of December, 1918, the logging company filed a claim of lien under the laws of the Territory of Alaska covering such of the logs as had not yet been cut into lumber and also upon two million feet of lumber remaining in the yard of the lumber company at Craig, Alaska, which had been cut from logs furnished under this contract, with certain exceptions which appear in the memorandum opinion of Judge Jennings. Judge Jennings' opinion appears at page 27 of the Transcript in case No. 3704. This lien notice was filed in conformity with the laws of the Territory of Alaska regulating loggers' liens.

Although there had been some logs furnished to the lumber company by others than the logging company, these other persons had been fully paid for their logs or their claims had been otherwise disposed of, so that there was no conflict as to priority between the logging company and any other lien claimant. The issue was squarely framed, upon the facts appearing in the opinions of the referee and of

the District Judge, as to whether the logging company had a right of lien to secure its claim and whether by reason of its failure to comply with the laws of Alaska in the matter of filing the necessary documents, it was barred from collecting the money due it.

POINTS AND AUTHORITIES

I.

The decision of the District Court upon the question of the right of the logging company to collect the money due for its work and upon the validity of the agreement covering the work having become final after the petition to review in this Court failed, that question is no longer open for trial here. It was decided adversely to the trustee and he must abide that decision.

In re Craig Lumber Co., 266 Fed. 692.

II.

Neither the lumber company nor the logging company having been citizens of Alaska, the contract between them was voidable only, and not void, even if the compliance of the logging company with the statute was incomplete. The lumber company having accepted the benefits of the contract and not having elected to avoid it, the trustee has now no right to make an election to treat the contract as invalid.

Section 660, Compiled Laws of Alaska, 1913.

V. Thompson on Corporations, Section 6708.

III.

Although the efforts of the logging company to comply with the laws of Alaska may have been misdirected, they were sufficient to consitute a substantial compliance with the law.

IV.

Under the law of Alaska, the logging company was entitled to a lien upon the logs cut by it for the agreed price of the labor done in securing the same.

Section 709, Compiled Laws of Alaska, 1913.

Day vs. Green; 127 Pac. 772 (Or.), 62 Or. 293.

W. T. Railway Co. vs. Tennas Bros. Co., 145 Fed. 458.

Chapman vs. Brewer, 62 N. W. 320 (Neb.)

Jones on Liens, Section 720.

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Breault vs. Archambault, 67 N. W. 348 (Minn.)

Hopkins vs. Jamieson-Dickson Mill Co., 39 Pac. 815.

Blumauer vs. Clock, 64 Pac. 844.

O'Connor vs. Burnham, 95 Pac. 1013.

Martin vs. Wakefield, 42 Minn. 176.

V.

The fact that the logs cut by the logging company may have been confused with other logs and cut into lumber, does not extinguish the lien.

Fischer vs. Cone Lbr. Co., 49 Ore. 277; 89 Pac. 737.

Day vs. Green, 62 Ore. 293, 172 Pac. 772.
Schultz vs. Shively, 72 Ore. 450; 143 Pac. 1115.

ARGUMENT.

THE LOGGING COMPANY OUGHT NOT TO LOSE THE BENEFIT OF THE WORK DONE BY IT BECAUSE OF INACCURACY IN PREPARATION OF THE PAPERS FILED BY IT IN SEEKING TO COMPLY WITH THE ALASKA CORPORATION LAWS.

Very little attention will be given in this

brief to the question of the right of the logging company to collect for its work on at least a general claim. It is believed that this question is set at rest by the decision of District Judge Jennings, against which a petition for review was filed in this Court and decided in 266 Fed. 692. Holding this view of the case, it is not considered important to devote extended argument to this question.

However, if the question were open for discussion here, it is sufficient to say that the statute of Alaska (Sec. 660) only renders contracts with citizens of the Territory of Alaska void and does not make contracts with corporations formed outside of Alaska void. It was upon this ground that the District Judge based his opinion sustaining the right of the logging company to collect for its work. And further it is submitted that an examination of the papers filed by the logging company will disclose that they constitute a substantial compliance with the Alaska statute. They are inaccurate and incomplete but they do contain all of the information the statute was aimed to secure. All of the money due the Territory of Alaska as fees was paid and no one was injured by the inaccuracy in the preparation of the papers.

A CORPORATION IS A PERSON WITHIN THE MEANING OF THE LIEN LAWS.

The opinion of the Supreme Court of Nebraska in Chapman vs. Brewer, et al (supra) contains the following language:

> "Another contention is that our statute provides for a lien in favor of 'any person' and not in favor of a corporation and that a corporation cannot acquire a lien under our statute. 'Persons are divided by law into natural and artificial. Natural persons are such as the God of Nature formed us. Artificial are such as are created and devised by human laws for the purpose of society and government which are called "corporations" or "bodies politic."—1 Blackstone's Commentary 123. Enactments which related to persons would be variously understood, according to the circumstances under which they were used, as including or not including corporations. In its legal significance, it is said the word 'person' is a generic term and as such, prima facie, includes artificial as well as natural persons unless the language indicates that it is used in a more restricted sense. And further, 'If any general rule can be drawn from the decisions, it would seem to be this: That where the act imposes a duty towards or for the protection of the public or individuals, or grants a right properly common to all, and from participation in which the limited character of corporate franchises and the

absence of any natural rights in corporations do not, by any policy of the law, debar them, the term persons will, in general, include them, whether the act be a penal or a remedial one.' See End. Interp. St., Sections 87 and 89 and cases cited. 'We are satisfied that the word 'persons' in our Mechanic's Lien Law, include an artificial person or corporation.'"

This is the rule of the authorities and we submit that it is well founded both in precedent and in reasoning.

THE ALASKA STATUTES EXTENDED THE RIGHT OF THE LOGGER'S LIEN AS WELL TO THOSE WHO FURNISHED LABOR AS TO THOSE WHO PHYSICALLY PERFORMED IT.

The brief already filed herein on behalf of the logging company so far disposes of the issue as to the effect of the Alaska lien statute that it is not believed that much can be added to it. There seems to have been a direct conflict among some of the earlier authorities, and this conflict has led the writers of such texts as are cited by the District Judge in his memorandum opinion into loose statements of the effect of the authorities. As is pointed out in the opening brief, most of the authorities which oppose the contention of the logging company arise under statutes different in language than the Alaska statute.

The true effect of the authorities can best be determined from a common-sense consideration of the language of the statute and of the reasoning of the different cases. In the first place the Alaska statute does not contain any of the restrictive words or phrases which resulted in the holdings of such courts as the Maine court. In that state the Legislature used the expression "personal services" with a view of limiting the lien claimant to a lien for the services performed by him. The Alaska statute, however, is in general terms. Nothing in the language of the statute indicates a disposition to restrict its interpretation or to limit its effect. The District Judge seems to have misconceived the true rule of construction of such statutes. He used the expression that the statute is in derogation of the common law, as indicating that it should be strictly construed. He proceeded further to the observation that it is also a remedial statute and must be liberally construed, so as to effect the intent of the Legislature. His reasoning seems to be that the scope of the statute must be determined by a strict construction of its language, and then that it is to be liberally construed within its limited scope. Nothing could be farther away from the true rule. While it is true that the intent of the Legislature must be determined by consideration of the language of the statute, it is equally true that in the interpretation of the language the court will look to the evil sought to be remedied, and will give the language that interpretation which most effectually supplies the remedy.

The District Judge referred to the case of Breault vs. Archambault, 64 Minn. 420, with the observation that it simply holds that a blacksmith employed at the camp, in shoeing horses and repairing sleds, and in mending and keeping in order the tools used by the men actually engaged in a common enterprise, is also entitled to a lien. We think the authority is of much more value than the court indicated in its opinion. The statute in question in that case read:

> "Any person who may do or perform any **manual labor** in cutting, banking, driving, rafting, cribbing, or towing any logs, shall have a lien thereon for the amount due for such services."

The court, having observed that the opponents of the lien claimed a strict construction of the statute and sought to limit its application to those persons who actually and personally performed the work, proceeded with the following language:

> "That the statute in question was enacted to correct an abuse and to remedy an evil which had grown to enormous proportions, is a matter of common history. Many owners of pine land habitually entered into logging contracts with reckless and irresponsible parties, the purpose and inevitable result being that the men who did the work were unable to collect their wages. The statute was passed to protect these men,

and the interests of labor and a sound public policy require that it be liberally construed; that a construction be placed upon it which will protect all who, in furtherance of the common object, go into the logging camp and there engage in the business of converting trees into logs and timber, in hauling the same to the banks of the streams, and there driving or rafting the product of their labor to market. * * *

"The policy of this court, when required to construe the log lien law, was announced in Martin vs. Wakefield, 42 Minn. 176. It was there declared to be a remedial statute, to be liberally construed to advance the remedy. * * *

"As before stated, the plaintiff in the Lane case furnished, at the request of the contractors, two teams, and two teamsters, to care for and drive the teams, at a gross price per month for each team and teamster. If plaintiff had driven these teams, the case would be covered by that of Martin vs. Wakefield, 42 Minn. 176, in which it was held that, when a man and team were employed at a gross price for both, his lien on the logs extended to the use of the team. But the difference is, that plaintiff Lane performed no manual labor personally, all being done by the hired teamsters. But we cannot assent to defendants' contention that there is a marked distinction between the cases. Plaintiff was acting through her

servants, and the terms of the statute, under the application of the maxim, 'He who acts through another acts himself,' are logically applicable to one who provides teams with which to haul logs, and men to drive the teams, as did the plaintiff Mrs. Lane. * * *

"We are of the opinion that, although she performed no manual labor in person, she did through her servants, and for their services and for the work done by her teams, is entitled to a lien. Should we hold otherwise, a person who had gone into the woods with a team under an agreement to haul would be deprived of a lien if disabled by an accident, and for that reason compelled to hire a substitute to handle the team. The language found in the statute should be construed as broadly as its common use will warrant, which would include such labor and services when performed by servants and agents, as well as personally, in a common count in assumpsit for work and labor. See Hogan vs. Cushing, 49 Wis. 169, a case in which it was held that a plaintiff could maintain a log lien, although the work was performed by his teams and servants. See, also, Perry vs. Duluth, etc., Ry. Co., 56 Minn. 306, in which it was held that one who let his teams and teamster to a sub-contractor to do work in constructing a railway was entitled to a lien under General Statutes, section 6231."

It will thus appear that the case cited is a

very well considered and effective authority for the proposition that, notwithstanding the restrictive words contained in the Wisconsin statute, it should be so construed as to extend a lien to one who furnishes labor as well as to one who physically performs it. The case also is a very early expression of the principle which is now settled beyond question that statutes extending liens for labor should receive a very liberal construction for the purpose of advancing the remedy.

This brings us to a consideration of the nature of the remedy to be advanced. Some of the earlier cases proceeded upon the theory that the object to be attained by the lien statutes was the protection of such ignorant and uninformed persons as made up the class of laborers, something after the manner of the rules of the maritime law, as they affected sailors. It is not believed that any statute ever passed in any of the states of the Union, or in its territories, ever contained language supporting such a doctrine. It was purely a court-made doctrine and it has long since been exploded. The lien statutes now extend the right of lien to every one who benefits the property of another by work furnished or performed or by material furnished. The class of persons to whom the lien claimant belongs has nothing whatever to do with the matter. The statutes are founded upon the principle of justice, which assures to the person performing work, furnishing work, or furnishing material the right

to be paid out of the thing the value of which he has enhanced. It is the theory of these statutes that no injustice is done to any one by holding the property benefited by work or material as security for the payment of the sums due for the work or material. In every enlightened community it is the common and every-day experience to find wealthy corporations and individuals claiming liens for labor and material furnished. The statutes of all the western states provide liens for contractors as well as laborers, and while these statutes afford no particular authority in a case of this kind, since their language expressly extends them to contractors, they do supply the court with a definite criterion by which to determine the nature of the remedy sought to be supplied by the lien laws. From these statutes, from the authorities herein cited, and from the language of the Alaska code in question, it is clear beyond debate that the remedy sought to be supplied is not the protection of a particular class of persons who, by reason of their ignorance, are unable to protect themselves, but is the enforcement of a simple rule of common fairness and right, that whoever has enhanced the value of a particular article by labor, whether performed by himself or by his agents, or by materials, whether he personally applied them or caused them to be applied, is entitled to look to the article whose value he has enhanced for the payment of his just charges for the labor or material.

Not contemplating the hypercritical attitude of lawyers in the construction of lien statutes, the Legislature used language of a general and sweeping character with the intention that it should be so construed as to include every case which could reasonably be brought within the common understanding of the language used. To indicate the nature of language used in various statutes, attention is called to Section 10191, Oregon Laws. After many amendments the law finally stands as follows:

> "Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, teamster, drayman, and other persons performing labor upon or furnishing material or transporting or hauling any material of any kind to be used in the construction * * * shall have a lien upon the same for the work or labor done or transportation or material furnished at the instance of the owner of the building or other improvement or his agent."

It will be noted that this statute, for all the care that has been used in attempting to close the mouth of every captious objector, still uses the words "performing labor." To say that it should not be so construed as also to include those who furnish labor and that where the contractor is a corporation to entitle it to a lien for the contract price, would not only run counter to the clear intention of the statute but would upset the existing order of business in the State of Oregon, where the statute pre-

vails. It is a daily experience in Oregon for liens to be filed and foreclosed under this section at the instance of corporation contractors, which include large sums of money accruing for labor furnished by the contractor. It would be possible to base a sort of argument upon the proposition that the statute refers to those who perform labor and those who furnish material, and that therefore no one but those who physically perform the labor could claim a lien for labor, while those who claim liens for material are put upon a different basis.

The same construction of the words "perform labor" which is prevalent in the State of Oregon, when applied to section 709 of the Alaska code, entitles the logging company to a lien. All that is necessary by way of construction to entitle the logging company to a lien in this case is to construe the word "person" to include artificial as well as natural persons, and to construe the language "performing labor upon or who shall assist in obtaining or securing" to include those who perform labor or render assistance by others as well as in person. The authority already cited conclusively establishes the rule of statutory construction that where the word "person" is used without restriction it should be construed to include artificial as well as natural persons, unless the contrary plainly appears; and the rule propounded in the case herein quoted from, that he who performs work by others as effectually performs it as though he had done the work with his own hands, seems to the writer

of this brief to be effectually settled, both as a proposition of principle and as a proposition of authority.

The case at bar offers a concrete illustration of the evil sought to be remedied by the lien statute. Four young men agreed to cut logs at $10.00 per thousand. The only distinction between such an agreement and a hiring by the day was in the manner of payment. It is true the arrangement was a contract, but so is every hiring a contract. The relation of master and servant is contractual in its nature, and it may exist even though the scale of compensation is fixed upon the quantity of work performed rather than upon the period of time consumed. The piece worker is a laborer exactly as the employe who works by the day is a laborer. These young men worked with their own hands. They worked much harder than any of the persons who have had to do with the long drawn-out litigation through which they seek recovery for the result of their efforts. The referee, in his statement of the facts, observed that they worked twelve hours per day and seven days per week at the very hardest kind of manual labor. It is true they also employed others to work, and having employed those others they paid them with money they had earned theretofore by the like vigorous efforts. They had theretofore formed a corporation, for convenience only. They owned all its stock, and so far as the effect in this case is concerned it did no more than to supply them with a convenient means of keep-

ing their accounts between themselves. The work they did so far enhanced the value of the logs that they cut as to supply the lumber company with the material for its operations. It is reasonable to suppose that the logs, when delivered at the mill, were worth to the lumber company, its stockholders and its creditors, a sum of money in excess of the price agreed to be paid to the loggers and the stumpage paid to the Government. If the logs were not worth more than the cost, then it is reasonable to presume that the lumber company would not have contracted for their delivery. If they were worth as much or more, then the added value was the property of the young men forming the logging company until it had been paid to them. It was their property by every rule of right and justice which could possibly be invoked, and if there had been no law, their right to it is so firmly grounded upon every principle of human fairness that it would not be questioned by honest men.

Now what is sought to be accomplished in the present proceeding? Simply this: That the mill company's other creditors seek to seize upon the logs in their enhanced state and to take to themselves the benefit of the labor performed and furnished by these four young men. And upon what theory do they seek to accomplish this result? Why because it is contended that having operated their business under a corporate name and having performed the work required of them by themselves and others, the young men had given to other cred-

itors of the corporation the result of their work.

It is not doubted that such a result as was accomplished in the court below can be brought about by the operation of law. Gross injustice is possible under the guise of law enforcement. But where such a construction of a statute is sought as will take from one that which by every principle of right and justice belongs to him and give it to another who has no honest claim upon it at all, the intention of the law to accomplish such a result ought to be clear and plain. Before such a construction can be given a statute there should be no doubt at all of that result having been contemplated by the framers of the statute.

In the case at bar a strained construction of the statute must be indulged to accomplish the extinguishment of the lien of the logging company, and we respectfully submit that nothing in the relation of the parties or the wording of the statute calls for any such strained construction.

ARTHUR I. MOULTON,
Of Attorneys for McDonald-Weist
Logging Company.